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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 121

MANHATTAN LIGHTERAGE CORPORATION, PETITIONER

v.

ERNEST ANDERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

STATEMENT

This suit was brought to recover overtime compensation, liquidated damages, and attorney's fees under Section 16 (b) of the Fair Labor Standards Act. The sole question involved is whether respondents are seamen within the scope of Section 13 (a) (3) of the Act which exempts from the minimum wage and overtime provisions "any employee employed as a seaman."

Respondents are employed in New York Harbor as "captains" of lighters owned and operated

by petitioner in its business of lightering cargo between ships and between ship and shore. The lighters have no motive power of their own but must be towed from ship to ship or from pier to pier. (R. 21.) Occasionally they may be moved short distances by means of ropes wound by respondents on a capstan or winch. The respondents' work is almost entirely confined to duties similar to those of longshoremen in loading and unloading ships. The duties of respondent Ernest Anderson are typical and are set forth in an affidavit printed in respondents' Brief in Opposition,[1] which may be summarized as follows.

Each morning Anderson selects a gang of longshoremen to work with him on his lighter for that day. The group load and unload vessels, working in the same manner as if they had been hired to work ashore. Anderson's job in connection with the loading and unloading activities is to operate the winch lifting and lowering the cargo hooked onto a block and fall, a job exactly like that of the winchman in the longshoreman's gang working on shore.

Anderson's shore duties, in addition to hiring and paying his labor gang, include checking the

[1] Pp. 5–8. A stipulation printed at p. 39 of the record permits reference to affidavits and depositions of the respondents. The testimony of other respondents, not differing materially from Anderson's affidavit, is set forth in an appendix to appellee's brief in the Circuit Court of Appeals to which reference is made in its petition.

cargo on the dock against the cargo list for the purpose of identifying those items which are to be loaded and examining the cargo in order to determine its condition at the time of receipt. The foregoing activities, which are in all respects similar to the work of a longshoreman, occupy about 95 percent of Anderson's work time.

Anderson's nautical duties, on the other hand, are negligible. Petitioner's lighters are towed by tugboats. The tug crew generally takes charge of navigation. Respondent Anderson checks the tie lines securing the lighter to the dock or ship at the end of the day, reports any damage to the lighter, and detects any leaks. As an incident to the operation of the hoist, Anderson pumps out bilge water. He is in no way responsible, however, for the movement of the lighter to and from the dock. As a general rule he is not even on board during a tow, for the towing is usually done at night after he has gone home. On the few occasions each month on which it is necessary to move the lighter during working hours, Anderson stays on board, but he has no duties with respect to navigation. On such occasions Anderson's only activity is to help with the tow lines when the tug crew requests.

Although some of the barge captains occasionally eat, sleep, or cook aboard a lighter under unusual circumstances (Pet. 5), Anderson has not done so. He is not required to have a

seaman's rating. Deductions are made from his wages in accordance with the requirements of the Social Security Act and in addition he is entitled to unemployment insurance benefits. Anderson works eight hours per day at an hourly rate, receives one and one-half times this rate for daily hours in excess of eight and for work on Sunday, and is regularly employed six days each week.

The court below held that respondents were not seamen within the meaning and intent of the exemption from the Act.

ARGUMENT

Petitioner contends that the decision below is in conflict with the decision of the Fifth Circuit in *Gale* v. *Union Bag & Paper Corp.*, 116 F. (2d) 27, certiorari denied, 313 U. S. 559, and that it is inconsistent with this Court's decision in *Norton* v. *Warner Co.*, 321 U. S. 565. We think the decision below is correct and that there is no conflict.

1. The term "seaman," like the term "member of the crew" has various meanings and the correct interpretation must depend on the context in which the word appears. Congress has expressly adopted at least three definitions of "seaman," the application of each of which must be limited to the particular statute in which it ap-

pears.[2] See *Warner* v. *Goltra,* 293 U. S. 155, 160–161. "What concerns us here and now is not the scope of the class of seamen at other times and in other contexts. Our concern is to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained." *Ibid.,* 293 U. S. at 158.

The decision below follows the Administrator's interpretation that the term "seaman" as used in Section 13 (a) (3) refers to one who performs aboard a vessel "service which is rendered primarily as an aid in the operation of such vessel

[2] The definition applicable to some of the Shipping Commissioners' Acts (Section 65 of the Act of June 7, 1872, c. 322, 17 Stat. 277, now 46 U. S. C. 713) provides: "That to avoid doubt in the construction of this act, every person having the command of any ship belonging to any citizen of the United States shall, within the meaning and for the purposes of this act, be deemed and taken to be the 'master' of such ship; and that every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman' within the meaning and for the purpose of this act * * *."

In the immigration laws a seaman is defined: "The term 'seaman' shall include every person signed on the ship's articles and employed in any capacity on board any vessel arriving in the United States from any foreign port or place." Act of Feb. 5, 1917, c. 29, secs. 1, 37, 39 Stat. 874, 897, 8 U. S. C. 173.

In the public health laws, the term is defined: "The term 'seaman' * * * shall be held to include any person employed on board in the care, preservation, or navigation of any vessel, or in the service, on board, of those engaged in such care, preservation, or navigation." Act of 1875, c. 156, sec. 3, 18 Stat. 485, as amended, 24 U. S. C. 1.

as a means of transportation, provided he performs no substantial amount of work of a different character," and that "loading and unloading and activities relative thereto" are nonexempt work. See Interpretative Bulletin No. 11, July 1939, revised July 1943, paragraphs 3, 6.[3] Admittedly this construction of the word "seaman" does not include all workers who have been held to be seamen within the meaning of the term as used in other contexts and in other statutes having different purposes. But it includes all maritime workers whose exemption is required in order to give effect to the purposes and reasons Congress had in mind in providing the exemption and at the same time does not deny the protection of the Act to workers to whom such purposes and reasons have no application.

The legislative history of Section 13 (a) (3) shows that Congress did not intend to exempt miscellaneous harbor workers such as cargo workers from the coverage of the Act, but that the exemption had three purposes: (1) To avoid conflict between the Fair Labor Standards Act and regulations adopted by the Maritime Commission; (2) to avoid the impracticable task of compelling maritime employers and employees to adjust their special arrangements concerning wages, food, and quarters to the requirements of general minimum wage legislation; and (3) to exempt those mari-

[3] The pertinent sections of the bulletin are printed in Appendix A, *infra*, pp. 18–21.

time workers to whom the overtime provision could not reasonably be applied under conditions prevailing in the operation of vessels.

The main purpose of the exemption was to avoid conflict between two sets of government regulations by exempting those workers whose wages and hours are subject to control by the Maritime Commission under the Merchant Marine Act of 1936.[4] The original Black-Connery bill was drafted in such a way as to cover all maritime workers engaged in commerce. When the bill was in committee, therefore, the two chief labor organizations representing seamen called the Committee's attention to the Merchant Marine Act and expressed a strong desire that the bill should be amended to exempt "seamen" to avoid any interference with the prior legislation. (See letter of the Sailors Union of the Pacific, Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st sess., pp. 1216, 1217. See also statement of Ralph Emerson,

[4] Act of June 29, 1936, c. 858, sec. 301, 49 Stat. 1992, 46 U. S. C., sec. 1131 (a). Sec. 301 (a) of this Act provided: "The Commission is authorized and directed to investigate the employment and wage conditions in ocean-going shipping and, after making such investigation and after appropriate hearings, to incorporate in the contracts authorized under titles VI and VII of this Act minimum-manning scales and minimum-wage scales and reasonable working conditions for all officers and crews employed on all types of vessels receiving an operating-differential subsidy. * * *"

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legislative representative of the National Maritime Union (*id.* at 546, 547, 548, 549).)[5]

The Section 13 (a) (3) exemption grew directly from the requests of these union representatives. When the committee reported the bill, it offered an amendment to exempt "seamen." S. 2475, S. Rept. 884, 75th Cong., 1st sess. The amendment was accepted by the Senate. Later Senator Black, who as Chairman of the Committee had said during Mr. Emerson's testimony that he believed "it would be improper to have a conflict of jurisdiction between two boards," stated on the floor in explanation of the amendment (81 Cong. Rec. 7875):

> * * * it was the policy of the committee in cases where regulation of hours and wages are given to other governmental agencies, to write the bill in such way as not to conflict with such regulation. That action was taken with reference to maritime workers.

There is no reason for extending the exemption beyond the general class of navigation workers who man maritime vessels and who for years have been treated as a special group in legislation affecting their employment relations.[6] Lighter

[5] The pertinent portions of Mr. Emerson's statements are printed in Appendix B, *infra*, pp. 22–26.

[6] The interpretation which the Administrator has put upon Section 13 (a) (3) does not confine the exemption to workers operating vessels receiving differential subsidies and therefore coming under the particular legislation which de-

workers loading and unloading cargo, as well as dredge workers, longshoremen, and other harbor workers, are not in that class of navigation workers. They are not protected by other wages and hours legislation.

The second reason for the "seaman's" exemption was the impracticability of regulating the wages of seamen in the manner contemplated in the Fair Labor Standards Act. Most actual seamen, i. e., workers navigating transport vessels, must be furnished food and quarters free of charge (46 U. S. C. secs. 80, 564, 713), and for that reason they were opposed to having applied to them general legislation which permitted an employer to include in wages the cost of facilities furnished to his employees (Section 3 (m) of the Act, 29 U. S. C. 203 (m). See Joint Hearings, pp. 548, 549, Appendix B, *infra*, pp. 25–26).[7] There is no

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fines the jurisdiction of the Maritime Commission. It would be unfair and impracticable to apply the exemption to vessels receiving the subsidy and not to competing vessels which did not. Furthermore, other consideration also entered into the determination that "seamen" should be exempt. Since, however, one purpose was to avoid conflict of authority by exempting workers subject to the Maritime Commission, the extent of the Maritime Commission's authority should be given great weight in determining the scope of the exempt class of workers.

[7] There are, of course, other services and accommodations of value—e. g., maintenance and cure—reflected in the wages paid to true seamen, as the term is herein used. These are supplied by the shipowner in accordance both with the general maritime law and with statute. See 46 U. S. C. 563, 564, 591–600, 622, 670, 673. These maritime laws do not extend

difficulty, however, in applying the scheme of the Act to the minimum wage paid to respondents. They do not live on board the lighters. They receive an hourly wage, and meals are not supplied by the employer.

The third reason for the exemption—the impracticability of regulating the hours of transport seamen—lends even greater support to a distinction between seamen and cargo workers such as respondents. The seaman's contract binds him to the vessel for the whole voyage and under all conditions and perils of the sea. During the voyage these men are on board at all times and are constantly subject to call in case of emergency. "Under the best of union conditions in the maritime industry as affecting the seamen it is impossible at the present time for us to work less than 56 hours a week" (Appendix B, *infra*, at p. 25). Similar requirements exist as to workers who are continuously engaged in navigating barges and other vessels plying the inland waterways. The objective of the Fair Labor Standards Act to attain a workweek limited to 40 hours could not feasibly have reached its mark in any of these situations. Cf. *Armour & Co.* v. *Wantock*, 323 U. S. 126; *Skidmore* v. *Swift & Co.*, 323 U. S. 134. "To restrict their employment to a week of 44 hours and ultimately to 40 hours per week would greatly interfere with the operation of such means

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to the class of maritime workers marked out by the Administrator as nonexempt.

of transportation" (*Gale* v. *Union Bag & Paper Corp., supra,* p. 28). This circumstance alone was a strong reason for exempting seamen from the general legislation. See *Helena Glendale Ferry Co.* v. *Walling,* 132 F. (2d) 616, 619 (C. C. A. 8).

This reason, however, does not apply to a worker engaged in facilitating the loading and discharging of cargo by means of a water-borne winch. His main task is not that of a seaman. It is merely the performance of a duty "that formerly was ordinarily done by the crew, not upon the high sea, but at the ship's destination, minus the perils of the sea. He does not undergo the hardships and dangers, nor does he surrender the personal rights and liberties that a seaman does in binding himself to the vessel as a member of its crew * * *." *Flannagan & Sons* v. *Carken,* 11 S. W. (2d) 392, 394 (Tex. Civ. App.). Unlike seamen, who are paid by the month, respondents since at least the year 1938 have been paid an hourly wage and have received one and one-half times their regular rate for all hours over eight per day. Even before the Fair Labor Standards Act, maximum hour arrangements not unlike those embodied in the Act were voluntarily applied to the work of the respondents. The conditions of these men do not present the regulatory difficulties which the exemption was designed to avoid.

To effect the three purposes of the seaman's exception requires the exemption of workers who

serve on board vessels primarily to aid in their operation as means of transportation, and no others. Correlatively, all three purposes can be accomplished without exempting workers engaged primarily in loading and unloading vessels. Respondents are not subject to the jurisdiction of the Maritime Commission. They are paid an hourly wage and do not receive meals or, unless under exceptional circumstances, any quarters or lodging. They already receive overtime compensation under contractual arrangements which may practically be brought into accord with those required by the Fair Labor Standards Act. The line between those who are exempt and those who are nonexempt has been drawn by the Administrator and applied by the court below in such a way as to achieve the three purposes of the exemption and at the same time to grant the protection of the Act to employees like respondents who require such protection and can be accorded it without practical difficulty. The established rule of strict construction of exemptions from a remedial statute of this character forbids extending the exemption any farther. See *Phillips* v. *Walling*, No. 608, October Term, 1944, decided March 26, 1945, pp. 2–3 of slip opinion; *Walling* v. *Bay State Dredging & Contracting Co.*, 149 F. (2) 346 (C. C. A. 1), and *Walling* v. *Great Lakes Dredge & Dock Co.*, 149 F. (2d) 9 (C. C. A. 7).

The line of demarcation between seamen and non-seamen which the Administrator and the court below have followed, although adapted to the requirements of the specific situation, is not original nor unusual, but follows a line established by the decisions of this Court in analogous cases. In *Norton* v. *Warner Co.*, 321 U. S. 565, on which petitioner relied (Pet. 14–15), the employee received a monthly salary and lived, ate, and slept on his barge. He set out the navigation lights, pumped water, repaired leaks during the voyage, had active and continual care of the tow lines, and performed other tasks related to the movement of the barge in transportation. He "had no duties in connection with the handling of the cargo and no shore duties" (p. 568). He was held to be a "member of the crew," and therefore a "seaman" (entitled to redress for injuries as such rather than to compensation under the Longshoremen's and Harbor Workers' Act), because he "was naturally and primarily on board the vessel to aid in her navigation" (p. 572). *South Chicago Co.* v. *Bassett,* 309 U. S. 251, makes it clear that a different conclusion follows where the primary duties relate not to navigation but to loading and unloading and activities characteristic of shore duties. A deck hand on a lighter whose duties were concerned chiefly with loading and unloading and "did not pertain to

navigation aside from the incidental task of throwing the ship's rope or making the ship fast" was held not to be a "member of the crew" but "may appropriately be regarded as in the position of longshoremen or other casual workers on the water" (p. 260).[8] The test which the Administrator would apply here is identical.

It is not material that the *South Chicago* and *Norton* cases deal with the phrase "member of the crew" rather than with the term "seaman." We do not cite these cases as controlling precedents but as illustrations of the line of demarcation which will give effect to the purposes of the exemption and at the same time carry out the broad remedial policies of the Fair Labor Standards Act.

2. There is no conflict among the circuits on the question here involved. The decision of the Fifth Circuit in *Gale* v. *Union Bag & Paper Corp.*, 116 F. (2d) 27, involved quite different

[8] Cf. *Beddoo* v. *Smoot Sand & Gravel Corp.*, 128 F. (2d) 608 (App. D. C.), which held that an employee on a river dredge whose main task was to coal up the dredge from a scow was not a member of the crew. Accord: *Andersen* v. *Olympian Dredging Co.*, 57 F. Supp. 827 (N. D. Calif); *Puget Sound Bridge & Dredging Co.* v. *State Unemployment Compensation Comm.*, 168 Ore. 614, 126 P. (2d) 37; *Grant Contracting Co.* v. *Murphy*, 387 Ill. 137, 56 N. E. (2d) 313; *Shore Fishery, Inc.* v. *Board of Review*, 127 N. J. L. 87, 21 A. (2d) 634. *Contra: Kibadeaux* v. *Standard Dredging Co.*, 81 F. (2d) 670 (C. C. A. 5).

facts. The barge tenders held to be seamen in the *Gale* case were engaged primarily, if not exclusively, in aiding the operation of barges as means of transportation under the command of a tug captain. The court based its decision on the ground that the bargemen's duties were essentially related to the transportation or the voyage, as distinguished from such non-nautical work as loading and unloading cargo. According to the findings of fact in the *Gale* case,[9] the main duties of the bargemen were performed during the actual course of transportation. When the barges were at the landings for loading or unloading, the barge tender's duties were negligible. 30 F. Supp. at 648–649. The circuit court of appeals emphasized the importance of the bargemen's duties while "on a voyage" and that there were "necessary and usual to the navigation of the barges." In short, the bargemen were essentially water transportation employees engaged in moving merchandise over the navigable waters.[10]

[9] See *Lowrimoore* v. *Union Bag & Paper Corp.*, 30 F. Supp. 647 (S. D. Ga.), referred to by the circuit court of appeals in the *Gale* opinion, 116 F. (2d) at p. 27.

[10] Following the Fifth Circuit's decision in the *Gale* case, the Administrator revised his Interpretative Bulletin so as to recognize the applicability of the exemption to barge tenders performing the normal duties "necessary and usual to the navigation of barges * * * unless they do a substantial amount of nonexempt work." See Interpretative Bulletin No. 11, as revised July 1943, paragraph 6, *infra*, at p. 20.

No circuit court of appeals has held the exemption applicable to workers engaged essentially in shore or harbor duties as distinguished from navigation or transportation duties. The two other circuits which have ruled on the question are in agreement with the decision below and with the Administrator's interpretation that, for the purpose of this particular statute, the term "seaman" is limited to workers engaged essentially in navigation or water transportation duties. *Walling* v. *Bay State Dredging & Contracting Co.*, 149 F. (2d) 346 (C. C. A. 1); *Walling* v. *Great Lakes Dredge & Dock Co.*, 149 F. (2d) 9 (C. C. A. 7). In both of these cases, workers on non-self-propelled dredges, engaged in dredging mud and other material from the bottom of rivers, creeks, and harbors, were held outside the scope of the exemption on the grounds that "their work was essentially connected with excavation and not with navigation" (*Bay State Dredging & Contracting Co.* case, 149 F. (2d) at p. 349), and that their services were more like the services of longshoremen and harbor workers and thus distinguishable from those of employees "on the vessel who are naturally and primarily on board to aid in her navigation" (*Great Lakes Dredge & Dock Co.* case, 149 F. (2d) at p. 11).

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

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